BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA L. SCOTT, SURVIVING LEGAL SPOUSE OF GARY R. SCOTT, DECEASED, AND JOHN WAYNE SCOTT AND THOMAS RICHARD SCOTT, MINOR DEPENDENT CHILDREN OF GARY R. SCOTT, DECEASED	)	
Claimants	)	
VS.	)	
	)	Docket No. 201,929
WOLF CREEK NUCLEAR OPERATING CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimants appeal from an Award rendered by Administrative Law Judge Julie A. N. Sample on November 6, 1997. The Appeals Board heard oral argument May 8, 1998.

APPEARANCES

Randall E. Fisher of Wichita, Kansas, appeared on behalf of the claimants, Sandra L. Scott (now Sandra L. Atkin), Thomas Richard Scott, and John Wayne Scott. Kim R. Martens of Wichita, Kansas, appeared on behalf of Wolf Creek Nuclear Operating Corporation, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimants did not make a written claim for compensation within one year from the date of Gary Scott's death as required by K.S.A. 44-520a. Claimants assert they did not make an earlier written claim because Mrs. Scott relied on statements by representatives of respondent advising her the death of her husband was not compensable under the Kansas Workers Compensation Act. The issue on appeal is whether Wolf Creek is estopped, because of the advice given Mrs. Scott, from using as a defense the fact claimants failed to make timely written claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The ALJ held that Wolf Creek was not estopped from asserting as a defense the failure to make a timely written claim and ruled that the claim should be denied on that basis. After reviewing the record and considering the arguments, the Appeals Board concluded, for the reasons given below, the decision by the ALJ should be affirmed.

Gary Scott suffered a heart attack at work on July 13, 1992, and died that same day. On May 16, 1994, almost two years after Mr. Scott's death, Mrs. Scott filed a medical malpractice action against Wolf Creek for the actions of a physician assistant employed by Wolf Creek. In defense of the malpractice action, Wolf Creek asserted that Mr. Scott's death was compensable under the Workers Compensation Act; that the liability action was therefore barred by the exclusive remedy doctrine found in K.S.A. 1990 Supp. 44-501. In April 1995, the District Court granted Wolf Creek summary judgment and Mrs. Scott appealed. In December 1996 the Court of Appeals affirmed the District Court decision and agreed the claim could be pursued only as a workers compensation claim. In its decision, the Court of Appeals recognized, to our knowledge for the first time, a workers compensation claim based on loss of chance of survival due to negligence by the employer or co-employee. Scott v. Wolf Creek Nuclear Operating Corp., 23 Kan. App. 2d 156, 928 P.2d 109 (1996).

Claimants filed this workers compensation claim on May 31, 1995, shortly after the District Court granted Wolf Creek summary judgment in the malpractice action but almost two years after Mr. Scott's death. Claimants acknowledge the claim is late under time limits provided in the Workers Compensation Act. In this case, Wolf Creek did not file a report of accident with the workers compensation director and claimants, therefore, had one year to make a written claim. K.S.A. 44-557 (Ensley). Asp v. McPherson County Highway Dept., 192 Kan. 444, 388 P.2d 652 (1964). The only question presented is whether Wolf Creek should be estopped from using this time limit because of statements by its employees to Mrs. Scott.

Shortly after her husband's death, Mrs. Scott talked with Mr. John A. Callewaert, the benefits supervisor, and Mr. Gary D. Burchart, the manager of human resources. Although neither remembered telling Mrs. Scott workers compensation benefits would not be available, both acknowledged that if asked they probably would have said workers compensation benefits would not be available because heart attacks are generally not compensable. Mrs. Scott testified specifically that both advised her that it was not a workers compensation issue and that she relied on those statements. The ALJ found, and the Board also finds, the two representatives both advised Mrs. Scott her husband's death did not entitle her to benefits under the Workers Compensation Act. In addition, the ALJ found, and the Board also finds, Mrs. Scott relied on this advice and, for that reason, did not initially pursue workers compensation benefits.

On the other hand, the Board finds, as did the ALJ, that neither of the representatives intentionally misled Mrs. Scott. It appears more probably true than not that they both acted on a good faith belief that no workers compensation benefits were owed.

Before applying the principles of estoppel to these facts, the Board notes it would likely question whether the equitable doctrine of estoppel is applicable in a workers compensation proceeding were it not for statements made by the Court of Appeals in the malpractice decision. The Board recognizes a number of states do apply equitable estoppel principles in workers compensation actions. *See*, e.g., Schaub v. Vita Rich Dairy, 236 Mont. 389, 770 P.2d 522 (Mont. 1989); Cibula v. Allied Fibers & Plastics, 14 Va.App. 319, 416 S.E.2d 708 (Va.App. 1992). At least one state does not. Nelson v. State Acc. Ins. Fund, 43 Or. App. 155, 602 P.2d 341 (Or. App. 1979). The Kansas Court of Appeals recently ruled that the equitable doctrine of laches cannot be used in a workers compensation proceeding. Burnside v. Cessna Aircraft Co., 24 Kan. App. 2d 684, 951 P.2d 1315 (1998). In that case, the Court reasoned that there is no statutory provision for laches in the Workers Compensation Act and the Act is considered complete within itself. The same statement might be made with regard to equitable estoppel.

But the Court of Appeals appears to have answered the Board's question in the Scott opinion. There, plaintiff argued defendant should be estopped from asserting the exclusive remedy provisions of the Workers Compensation Act because Wolf Creek representatives told the deceased's widow that workers compensation benefits would not be available. In answer to that argument, the Court of Appeals stated:

> The district court ruled that estoppel would be available to plaintiffs in workers compensation proceedings and the issue should be resolved in that forum. We agree. Furthermore, any determination by the workers compensation hearing officer and appeals board regarding plaintiffs' estoppel argument will be subject to appeal.

Even if the above language is dicta, the Court of Appeals appears to be saying, without ruling on specific application to this case, that the doctrine of promissory estoppel

does apply in a workers compensation action. Wolf Creek agreed with this understanding of the language within the Scott decision in its brief and at oral argument.

The question then narrows to when estoppel should apply and whether the facts of this case, as found above, prevent respondent from defending the claim on the grounds the claim was not filed in time. The ALJ ruled that the statements by Wolf Creek representatives would not prevent Wolf Creek from relying on the written claim defense so long as the statements did not amount to fraud or constructive fraud. The ruling relied in significant part on the Supreme Court decision in Asp v. McPherson County Highway Dept., *supra*. In that case, the Kansas Supreme Court held that actions of the employer, including a policy of the employer that all workers compensation claims were relinquished if not made within seven days, did not amount to constructive fraud and therefore did not toll the time for filing a claim. The Court does not discuss promissory estoppel but does appear, as the ALJ ruled in this case, to require constructive fraud before the time limits will be tolled.

In civil liability cases, dealing more specifically with promissory estoppel and statute of limitations, the Kansas Court of Appeals has said that actual fraud, bad faith, or attempt to mislead or deceive are not essential. It is enough if the party does something that amounts to an affirmative inducement to the other party to delay bringing the action. Levi Strauss & Co. v. Sheaffer, 8 Kan. App. 2d 117, 650 P.2d 738 (1982). In the Levi case, the Court found the defendant's conduct led the plaintiff to believe defendant was going to honor its exclusive dealership agreement. Because plaintiff relied upon that conduct and delayed filing an action to enforce the agreement, the Court ruled defendant was estopped from relying on the statute of limitations. Other examples cited in the Levi decision involve statements or conduct which leads someone to believe their potential action will be resolved and that they do not, for that reason, need to file. *See*, e.g., Pessemier v. Zeller, 144 Kan. 726, 62 P.2d 882 (1936).

The appellate courts of other states do not agree about when estoppel should be applied. Some states require bad faith on the part of the respondent to toll the statute of limitations. Odom v. Red Lobster, 20 Va.App.228, 456 S.E.2d 140 (Va.App. 1995); Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992); Niblett v. Piedmont Aviation, Inc., 12 Va.App. 652, 405 S.E.2d 635 (Va.App. 1991). In other states, the Court has applied equitable estoppel where the actions of the employer lead claimant to believe he or she does not need to file the claim to receive benefits, that is, there has been an affirmative inducement to not file. Larson's Workers' Compensation Law, Sec. 78.45, 15-381 (1997). In still other states, however, a statement by the employer that an injury is not compensable, even one made in good faith, has been held to be sufficient to estop the employer from using the statute of limitations defense. Davis v. Jones, 203 Mont. 464, 661 P.2d 859 (Mont. 1983); Robertson v. Brissey's Garage, Inc., 270 S. C. 58, 240 S.E.2d 810 (S. C. 1978).

The Board finds nothing in the Kansas decisions, however, which would suggest that a good faith statement that a claim will not be valid, as in this case a statement that it is not a workers compensation claim, invokes promissory estoppel. In fact the Kansas decisions suggest, in our view, something more is required. Specifically, there must be either fraud or an affirmative inducement not to file. Asp v. McPherson County Highway Dept., *supra*; Levi Strauss & Co. v. Sheaffer, *supra.*

The Board believes there is a material difference between an affirmative inducement and statement that an injury is not compensable. The affirmative inducement leads a claimant to believe he or she does not need to do anything further to receive benefits. The statement by an employer that the injury is not compensable alerts the employee that no benefits will be paid unless he or she does take some action. Many workers compensation actions begin with a denial of the claim by the employer. It is difficult to imagine that estoppel should apply to all cases where the employer denied the claim. It is also difficult to draw a meaningful distinction between denial of a claim and advice that the accident is not compensable.

Based on the above Court decisions and other considerations, the Board concludes the circumstances of this case do not warrant application of estoppel. Wolf Creek representatives did not intentionally mislead Mrs. Scott. Their conduct did not amount to actual or constructive fraud. The holding by the Court of Appeals in the Scott case approved an avenue of workers compensation liability not before approved. It would not be unusual for persons, even ones in positions dealing with employment or benefit issues on a regular basis, to be unaware that workers compensation liability existed for lost chance of survival due to negligence. The Board also concludes Wolf Creek's actions and statements were not an affirmative inducement. The Wolf Creek employees did not represent that workers compensation benefits would be paid. On the contrary, the employees advised Mrs. Scott workers compensation benefits would not be paid.

Promissory estoppel should not be applied here for an additional reason. Estoppel only applies if the party asserting estoppel had right to rely on the statements. Tucker v. Hugoton Energy Corp., 253 Kan. 373, 855 P.2d 929 (1993). In the current case, Mrs. Scott went to an attorney shortly after her husband's death for the express purpose of considering a malpractice claim. While the Board agrees, as claimant argues, one can go to an attorney for a limited purpose, the malpractice remedy and the workers compensation remedy are necessarily interrelated for the very reasons demonstrated by this case, workers compensation liability is an exclusive remedy and operates as a bar to a civil malpractice action. The Board, therefore, agrees with the ALJ when she suggests that Mrs. Scott's reliance on representation by Wolf Creek employees became unreasonable at the point she had counsel for a potential malpractice claim.

It appears claimants have been caught, at least in part, by an evolution in the workers compensation law which was difficult to predict. The Board does not, however, believe application of promissory estoppel is an appropriate remedy here. It is not

uncommon for an employee to file a workers compensation claim to protect the time limit but leave the claim inactive while pursuing a negligence claim. If the negligence claim is dismissed on the grounds that it should be a workers compensation claim, the workers compensation claim can then be activated and pursued. The legislature has also addressed the circumstances presented by this appeal in K.S.A. 44-520a(b). That statute tolls the time limits for written claim in cases where the liability action is filed within 200 days from the date of accident. If a liability action is filed within that 200 days and is later dismissed on grounds it should be a workers compensation claim, the time for making the workers compensation claim begins to run only when the negligence claim is dismissed or abandoned. Perhaps few negligence actions will be affected by this statute because few are filed within 200 days from the death or injury. This is, however, the relief provided in the Workers Compensation Act.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample on November 6, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The majority believes that the Court of Appeals in Scott answered the question of whether the doctrine of equitable estoppel can be used in workers compensation proceedings. I do not believe that issue was before the Court of Appeals in Scott. Had it

been, the Court would have had to distinguish its holding in Burnside. The Court did not and, therefore, Burnside is still good law.

Citing Jones v. Continental Can Co., 260 Kan. 547, 920 P.2d 939 (1996), the Court of Appeals in Burnside held that the Workers Compensation Act is complete within itself. Since the Act did not provide any basis for applying the equitable doctrine of laches, the Court could not do so.

> Under the "strict application" principles announced in *Continental Can*, there is no statutory authority in Kansas which would permit the doctrine of laches to time bar a claimant's application for workers compensation benefits, because the Kansas Workers Compensation Act is complete within itself. Burnside, at 692.

If the equitable doctrine of laches is not available in a workers compensation proceeding, it must follow for the same reasons that equitable estoppel is likewise not available.

The majority agrees that the estoppel language it quotes from the Scott decision was dicta. It was not essential to the decision reached by the Court. Furthermore, there exists the contrary authority of Burnside. Accordingly, the dicta in Scott need not be followed. *See* Kissick v. Salina Manufacturing Co., Inc., 204 Kan. 849, 466 P.2d 344 (1970).

Otherwise, I concur with the findings and conclusions by the majority.

BOARD MEMBER

c: Randall E. Fisher, Wichita, KS
Kim R. Martens, Wichita, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director